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Issue Date: 11 May 2007

CASE NO.: 2006-LHC-00664

OWCP NO.: 14-138835

In the Matter of:

E.P.,
Claimant,

vs.

STEVEDORING SERVICES OF AMERICA and
HOMEPORT INSURANCE COMPANY,
Employer and Carrier.

Appearances:

Peter Preston
For the Claimant

Richard M. Slagle
For the Employer and Carrier

Before: Gerald Etchingham
Administrative Law Judge

DECISION AND ORDER

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. ("the Act"). Claimant E.P. ("Claimant") seeks compensation and medical benefits for a cervical spine injury which he sustained in the course and scope of employment with Stevedoring Services of America ("Employer").

A hearing was held on July 11, 2006, in Portland, Oregon. Both parties were represented by counsel. Claimant's exhibits ("CX") 1-10, Employer's exhibits ("EX") 1-19, and Administrative Law Judge exhibits ("ALJX") 1-3 were admitted into evidence. TR at 5-8. At the close of the hearing, the record was left open for the submission of post-trial briefs, which were filed by Claimant and Employer and admitted into evidence on August 25, 2006, as ALJX 4 and 5, respectively. *See* TR at 8-9, 79. Employer also submitted the authorized post-trial deposition of Joseph Weber, which was admitted into evidence on August 25, 2006, as EX 20.

STIPULATIONS

At the hearing, the parties entered into the following stipulations (TR at 10-14):

1. This claim involves an accidental injury to Claimant which occurred on November 2, 2002.

2. At the time of the alleged injury, an employer/employee relationship existed between Claimant and Employer.

3. Claimant suffered an injury on November 2, 2002 which arose out of and in the course of his employment with Employer.

4. The Longshore and Harbor Workers' Compensation Act applies to this claim.

5. The claim was timely noticed and filed.

6. Claimant is not receiving compensation or medical benefits at this time.

7. Claimant reached maximum medical improvement on September 18, 2003.

8. This is a claim for an unscheduled injury.

9. Claimant's average weekly wage is $1,684.30.

10. Claimant's total number of worked hours and travel hours for the 2004 and 2005 calendar years exceed 3,000 hours.

Because I find that there is substantial evidence in the record to support the foregoing stipulations, I hereby accept them. *See generally* EX 1-12, 14-16; CX 1-9.

ISSUES

1. Is Claimant entitled to additional compensation for temporary disability?

2. What is the extent of Claimant's permanent disability, if any?

3. Is Employer obligated to pay for outstanding medical expenses?

See ALJX 1 at 2; ALJX 2 at 1.

FINDINGS OF FACT

Claimant, who was 48 years old at the time of trial, became a casual longshoreman in 1977. In 1994, he registered with Local 32 of the International Longshore and Warehouse Union ("ILWU") in Everett, Washington. When the work opportunity in Everett diminished, Claimant transferred to Coos Bay, Oregon, to pursue opportunities to work off the crane board. Claimant currently remains a member of the Coos Bay Local. TR at 27-8.

In about January 1998, the work opportunities in Coos Bay significantly decreased when two longshore employers ceased operations in the area. TR at 28. A pay guarantee program provides for 38 hours of base pay for union members when there is not enough work in their local port, but Claimant testified that he has drawn guarantee pay on only one occasion. TR at 29-30. After the work in Coos Bay dried up, Claimant found jobs by traveling to other northwest ports such as Tacoma, Seattle, and Everett, Washington. TR at 30. Claimant missed about six weeks of work in 2001 after he was hit in the face with a piece of steel. TR at 30-1.

The injury which is the subject of the present claim occurred on November 2, 2002, while Claimant was working on a lashing job for Employer in Seattle. TR at 10, 12, 31. Claimant was lifting a 30 to 40 foot aluminum pole when the pole suddenly went off balance, causing his left arm to take most of the pole's weight. He felt pain in his left shoulder. TR at 31. Claimant testified that he "was hurting," but he finished the shift. TR at 33. He believed he had injured his shoulder, and reported the injury accordingly. TR at 32-3; EX 1.

Claimant sought medical attention at the emergency room on November 4, 2002, and was diagnosed with left shoulder strain. EX 2. On November 6, 2002, Claimant saw Dr. Rene Santiano, who ordered an MRI of the shoulder and took Claimant off work. EX 3 at 1; CX 2 at 1. X-rays revealed no sign of fracture or joint abnormalities. CX 2 at 1; CX 4 at 2. Claimant underwent a left shoulder MRI on November 7, 2002, which was read as revealing "findings suggestive of a labral tear though one cannot be definitively demonstrated," and "small bursal effusion indicative of bursitis." CX 3.

Dr. Santiano referred Claimant to neurosurgeon Dr. Kirk L. Wong, who saw Claimant on November 21, 2002 and injected his shoulder with Lidocaine and Marcaine. TR at 34; CX 4 at 1-2. Dr. Wong's impression was (1) left shoulder pain, most likely secondary to labral tear with paralabral cysts, and (2) cervical radiculopathy. CX 4 at 2. Dr. Wong restricted Claimant against lifting greater than fifteen pounds, instituted physical therapy, and planned to re-evaluate Claimant in six weeks. *Id.* at 1-2.

On December 19, 2002, Claimant returned to Dr. Wong for a follow up and complained of weakness with forward shoulder movement and numbness and burning in his left arm. CX 4 at 3. Dr. Wong opined that Claimant's symptoms stemmed from cervical radiculopathy, and he ordered x-rays and an MRA of the neck. *Id.* The doctor also referred Claimant to Dr. Matthew Gambee for further evaluation. *Id.*

Claimant underwent a cervical spine MRI on January 2, 2003, which was interpreted as showing significant degenerative disc disease in the mid-cervical spine and multi-level neural foraminal narrowing on the right at C3-4, bilaterally at C5-6, and on the left at C6-7. CX 4 at 5. On January 20, 2003, Dr. Wong recorded Claimant's complaints of burning pain in the left arm involving the triceps and forearm. *Id.* at 6. The doctor noted that the January 2, 2003 MRI revealed multiple-level foraminal stenosis, and that Claimant would follow up with Dr. Gambee for further evaluation and treatment of his cervical spine. *Id.* Dr. Wong took Claimant off work indefinitely on January 6, 2003. EX 5 at 23.

Dr. Gambee wrote to Dr. Wong on January 22, 2003, noting that Claimant had slight left shoulder abduction weakness. CX 4 at 8. Dr. Gambee reviewed the left shoulder x-rays, which he felt were normal, and the neck MRI, which he felt showed a possible disc protrusion at C6-7. *Id*. Dr. Gambee ordered a CT myelogram and EMG testing. *Id.* The CT myelogram was done on January 28, 2003, and the impression was "prominent left posterolateral C6-7 disc protrusion or extrusion impinges upon the left C7 nerve root." CX 6 at 1.

On January 29, 2003, Claimant was examined by Dr. Jay D. Miller. In a letter to Dr. Santiano dated February 3, 2003, Dr. Miller noted Claimant's absent left triceps reflex, as well as 50% weakness and "clear-cut" atrophy of the left triceps muscle. CX 4 at 11. Dr. Miller felt that the cervical MRI suggested a cervical disc protrusion at C6-7 which was confirmed by the CT myelogram. *Id.* Dr. Miller's impression was C7 cervical radiculopathy due to soft cervical disc protrusion at C6-7 on the left, and he recommended a posterior cervical diskectomy. *Id.* Dr. Wong then referred Claimant to Dr. David W. Newell for another opinion. *See* EX 8 at 32.

Dr. Newell, who examined Claimant on or about April 10, 2003, reported his findings in a letter to Dr. Wong. EX 8. Dr. Newell noted a "slight amount of noticeable atrophy on the left," and diminished left triceps function. *Id.* at 33. The impression was "persistent left C7 radiculopathy with persistent weakness and symptoms." *Id*. Dr. Newell advised Claimant that his treatment options were to continue conservative therapy or consider surgery. Dr. Newell noted that Claimant "seems to want a minimally invasive posterior foraminotomy on the left at C6-7," and Dr. Newell indicated that he would "set that up." *Id*. Ultimately, however, Claimant elected not to have surgery in favor of continuing conservative treatment. TR at 35.

Claimant believes he started physical therapy shortly after the consultation with Dr. Newell. TR at 37. He testified that at that time he had symptoms including neck pain, left arm numbness, and loss of muscle strength. TR at 38. Claimant said that "it took some time," but physical therapy "eventually" helped. TR at 37-8. *See also* TR at 60.

On May 5, 2003, a representative of Employer's insurance carrier wrote to Claimant. The letter confirms that Claimant called the insurer on May 2 and advised that his condition had improved with physical therapy and that he was cancelling a surgery with Dr. Newell scheduled for May 5, 2003. EX 12 at 52. According to the letter, Claimant also stated his intention to continue physical therapy. *Id.* The stated purpose of the letter was to advise Claimant that the insurer was "concerned about this sudden change in [the] prescribed treatment plan at the last minute." *Id.* The letter goes on to state that the insurer would authorize two more weeks of physical therapy, but would be "unable to authorize any time loss benefits past that [two] week period." *Id.* at 53. Employer's insurer expressed that it was "disappointed" that Claimant "chose not to follow through with the recommended treatment plan at the last minute." *Id.*

On June 5, 2003, Employer issued a notice of controversion of Claimant's right to compensation and a notice of final payment or suspension of compensation benefits due to Claimant's "failure to follow through with prescribed medical treatment." EX 12 at 54, 55. The last compensation payment was made on May 21, 2003.[1] *Id.*

[1] Claimant received compensation for temporary partial disability from November 3, 2002 through December 20, 2002, and for temporary total disability from December 21, 2002 through May 23, 2003. *See* EX 12 50-1, 54.

At a follow-up appointment on May 7, 2003, Claimant reportedly asked Dr. Santiano about Botox injections to treat his cervical symptoms. CX 2 at 2-3; TR at 36-7. Dr. Santiano referred Claimant to pain management specialist Dr. Barbara Mallett, who examined Claimant on May 8, 2003 and diagnosed cervical radiculitis and cervical disk protrusion. CX 7 at 5. She recommended against Botox injections since she felt they would not be effective for the type of pain experienced by Claimant and injections along the spine would be "risky." *Id*. at 1, 4. Dr. Mallett recommended cervical epidural steroid injections or, if Claimant's pain did not respond to injections, she recommended repeat surgical consultation. *Id.*

On May 14, 2003, Dr. Santiano opined that Claimant was unable to return to work "until evaluated by doctor on May 30, 2003." EX 3 at 10. On May 30, 2003, Claimant was examined by Dr. Solomon Kamson, who is board-certified in minimal invasive spine medicine and surgery. CX 8 at 2. Dr. Kamson's assessment was probable cervical discogenic or facetogenic pain, and he opined that it was more probable than not that Claimant's condition was due to the industrial injury of November 2, 2002. *Id.* Dr. Kamson recommended that Claimant continue physical therapy. Claimant was to return in a week with his cervical MRI, CT myelogram, and medical records from his other health care providers, which Dr. Kamson planned to review in order to determine a course of treatment. *Id.* Dr. Kamson did not comment on Claimant's ability to return to work. The record contains no indication that Claimant ever returned to Dr. Kamson.

On September 18, 2003, Dr. Santiano reported that Claimant was "cleared to go back to work full-time." CX 2 at 9. Claimant was to inform Dr. Santiano if his symptoms worsened. *Id.* Claimant testified that Dr. Santiano orally advised him to avoid jobs and activities that cause pain, and to find jobs that do not cause discomfort. TR at 35-6, 58. To Claimant's knowledge, Dr. Santiano did not release him to work prior to September 18, 2003. TR at 36.

On August 19, 2005, Claimant, at the request of his attorney, underwent an independent medical examination by Dr. John Colletti, a board-certified orthopedic surgeon. CX 9. Claimant reported "some neck pain" and pain in the left trapezius region when he turns his head right or left. CX 9 at 3. Dr. Colletti noted that Claimant was working two to three days a week, but if he works more often he "gets a feeling of tenseness and ache in the left lateral neck sometimes radiating into the upper left arm." *Id.* Dr. Colletti recorded that Claimant had no left arm numbness or radicular symptoms, and his weakness had improved over the last year or two. *Id*.

On physical examination, Dr. Colletti found trace left triceps reflex and reduced strength of the left triceps. CX 9 at 4. Dr. Colletti recorded upper arm measurements of 13 inches on right and 12.5 inches on left, and forearm measurements of 11.5 inches on right and 11 inches on left. *Id.* at 5. Dr. Colletti diagnosed (1) left shoulder sprain (resolved) and (2) left C6-7 disc herniation with C7 radiculopathy with residual weakness and atrophy. He felt both conditions were related to the injury of November 2, 2002. *Id.* Dr. Colletti opined that Claimant continues to have diminished left triceps reflex, loss of one grade of strength, and a mild degree of measured atrophy of the left triceps, consistent as a residual objective finding related to the C7 radiculopathy. Dr. Colletti concluded based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (Fifth Edition) that Claimant has a 30% impairment of the left upper extremity. *Id.* at 5-6. Dr. Colletti felt that the findings of atrophy and loss of

strength are unlikely to change, as they relate to the herniated disc Claimant had sustained nearly three years earlier. *Id.* at 6.

Claimant returned to work on September 20, 2003. CX 1 at 2. At trial, Claimant testified that he continues to have neck pain, "a little bit" of pain in the left shoulder, and numbness and ache in the left arm. TR at 39. His symptoms worsen when he looks up or moves his neck side to side. TR at 39. He does not take any pain medication. TR at 39. Other than the evaluation by Dr. Colletti in 2005, he has not seen a doctor since 2003. TR at 58-9.

Claimant testified that certain longshore jobs bother his neck. TR at 40. He testified that crane driving bothers his neck least, since the entire crane "moves with you so you're not turning around and looking behind you." TR at 39-40. In contrast, Claimant said that semi truck driving requires him to frequently turn around when a container is being set on a chassis or to park the truck in a specific location. TR at 40-1. Similarly, forklift driving causes discomfort because the forklift is operated in reverse when loaded, requiring the driver to look over both shoulders. TR at 41. Since his injury, Claimant has worked full days on a forklift a few times but it bothered his neck every time. TR at 41. Claimant testified that bulldozer driving bothers his neck, but then could not recall if he had tried that job since his injury. TR at 40-2. He said he drove bulldozers before his injury and is aware that they are also operated in reverse when loaded. TR at 42. The log stacker job similarly requires the driver to look behind him to avoid hitting people and objects. TR at 42. Claimant also explained that the "checking" job requires the worker to look up at containers hoisted above his head in order to record a series of numbers from the container. TR at 42. Similarly, lashing jobs also require some looking up. TR at 43.

Claimant testified that of the jobs described above, he currently takes lashing jobs more frequently than any other, as they seem to be least problematic for his neck. TR at 43. Claimant explained that he takes lashing jobs because "sometimes I can get a drop and I'm only there an hour and a half. And that helps my neck if I'm not there all day long and I'm not looking up all day long. Less hours of use on the neck." TR at 65.

Claimant also said that he has taken other jobs on some occasions, and "always will have to take at least one day off and maybe more in a row to get my muscles to relax again." TR at 44. When he is off work, Claimant occasionally uses a traction device given to him by his physical therapist to "stretch" his spine and he lays down quite a bit "to get the neck to calm down." TR at 45. Claimant testified that he tries to avoid working two days in a row "because of the pain." TR at 47. He further testified that so long as he takes "some time off," his symptoms do not seem to progressively worsen. TR at 60.

Claimant testified about the hours he worked before his injury using records generated by the Pacific Maritime Association ("PMA"). TR at 45. The PMA payroll records reflect hours actually worked, travel hours, and vacation time. TR at 45-6. Based on the PMA records, Claimant testified that he worked 1632.5 hours in 198 shifts during the 52 weeks preceding his injury.[2] TR at 47. He also testified that he worked 1405 hours (171 shifts) during the 52 weeks

[2] Claimant noted that the 52-week period prior to his injury included eleven days during which longshore workers were "locked out," so that he did not work on these days. TR at 48.

after his return to work in September 2003, and 1380 hours during the subsequent 52 weeks. TR at 48-9, 50. Claimant testified that the reduction in hours worked is due to "the number of days like I feel neck can handle working." TR at 49. On prompting by his attorney, Claimant said the reduction in hours is also due to the types of jobs he is currently able to perform.[3] TR at 49.

On cross-examination, Claimant agreed that his actual worked hours (excluding travel hours) have not exceeded 1500 hours for the calendar years 2000 to 2006, inclusive. TR at 55. He testified that in the year he was injured (2002), he received less vacation pay than in previous years but since his return to work in 2003, there has been no reduction in his vacation pay. TR at 55-6. Claimant agreed that there has been an increase in his travel pay since 2003. TR at 56.

Since the work in Coos Bay diminished, Claimant takes jobs in other northwest ports such as Tacoma, Seattle, or Everett, Washington. TR at 30. Claimant explained that as part of the union contract, he gets paid for travel hours for the drive from Coos Bay to the port where he is seeking work. TR at 46. Claimant currently resides in Lake Stevens, Washington, which is twelve miles from the Port of Everett. TR at 51. The Everett waterfront is 444 miles from Coos Bay, Oregon, where Claimant is registered with the union. Therefore, when Claimant travels the twelve miles from his residence in Lake Stevens to the Everett waterfront for a job, he receives sixteen hours of travel pay plus mileage and subsistence pay. TR at 51-2. He also receives pay for the hours he actually works. TR at 52. Claimant does not know of any other longshore worker in this situation. TR at 53. Claimant does not receive travel pay if he works two consecutive days at a non-local port, but does receive subsistence pay to cover motel and meal costs. TR at 46-7. However, if Claimant works one day at a non-local port, takes the next day off, then works again the following day at the same port, he receives full travel pay for travel from Coos Bay to the non-local port and back. TR at 47. Claimant testified that he has not made any effort to transfer his union membership to Everett, and would not receive travel pay for Everett jobs if he were to do so. TR at 53.

Joseph Weber testified via deposition that he is the Area Manager for the Pacific Northwest Region of the PMA.[4] EX 20 at 4. Mr. Weber explained that the PMA administers labor agreements between the PMA and the ILWU, and keeps records of and coordinates wages paid to longshoremen. *Id.* at 5, 27. Mr. Weber explained that the PMA or the direct employer would enforce the contract if there were some indication that Claimant was not "living up to" its terms, but he was not aware of any such complaints about Claimant. *Id.* at 34.

Mr. Weber testified that the work opportunities in Seattle and Tacoma are growing but they are poor in Coos Bay. EX 20 at 9, 33. Mr. Weber further testified that an ILWU member may transfer his registration from one port to another if the Joint Port Labor Relations

[3] The following exchange took place on direct examination of Claimant by his attorney:

Q: What's affecting the number of hours you're getting?
A: Just the number of days like I feel my neck can handle working.
Q: How about the types of jobs that you can take?
A: And the types of jobs that are – that I'm currently able to perform.

TR at 49.

[4] Mr. Weber testified that the PMA is an association of various member companies comprised of shipping companies, terminal operators, stevedores and other longshore employers. EX 20 at 5.

Committees in both ports agree to the transfer. *Id.* at 9. Mr. Weber identified four transfers into Tacoma which were accepted between July 2005 and July 2006. *Id.* at 40-1. He did not believe any request for transfer into Tacoma was denied during this period. *Id.* at 41. Mr. Weber also explained that a longshoreman with a disability may request an accommodation through the agreement between the ILWU and the PMA, and several dozen such requests are received each year. EX 20 at 26. Mr. Weber testified that accommodations were made in "numerous cases, most cases." *Id.*

CREDIBILITY ANALYSIS

1. Claimant

I find that Claimant's testimony was credible with respect to the mechanism of injury and the symptoms of his cervical condition which he experienced from the date of his injury on November 2, 2002 through his return to work on September 20, 2003, as these are well-documented in the records of several physicians and are consistent throughout the record. However, Claimant's credibility is called into doubt by his exploitation of his union's travel pay system. Claimant readily admits that he remains registered in Coos Bay, Oregon even while he resides in Lake Stevens, Washington. As a result, Claimant admits that he receives sixteen hours of travel pay for the 444 mile trip from Coos Bay to Everett when he actually travels only twelve miles from Lake Stevens to Everett. Claimant also consistently receives travel pay to other Seattle-area ports, i.e., fifteen hours to Seattle and fourteen hours to Tacoma. Although the union may condone this windfall, I find that Claimant's actions undercut the credibility of his testimony that he rarely works two consecutive days due to his cervical symptoms. Rather, I find that Claimant has a strong incentive not to work two days in a row in Seattle-area ports, as this prevents him from collecting full travel pay.

2. Joseph Weber

Mr. Weber testified via deposition taken on July 13, 2006. EX 20. While I did not have the opportunity to observe Mr. Weber's demeanor or testimony, I generally find him to be a credible witness. I note that Mr. Weber admitted that the interests of the PMA/Employers conflict with those of the ILWU members in some situations. *Id*. at 28. However, there is no indication that this colored his testimony in this case.

DISCUSSION

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent. As previously noted, the follow issues are in dispute: (1) whether Claimant is entitled to additional compensation for temporary disability; (2) the extent of Claimant's permanent disability, if any; and (3) Employer's obligation for outstanding medical expenses. *See* ALJX 1 at 2; ALJX 2 at 1.

1. Claimant's Entitlement to Compensation for Temporary Disability

To establish a claim for benefits under the Act, a claimant must establish the existence of a "disability," defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). "Injury" is defined in part as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Employer concedes that Claimant sustained a cervical injury on November 2, 2002 in the course and scope of his employment. TR at 10. This is supported by medical opinions in the record. *See, e.g.,* CX 8 at 2 (Dr. Kamson); CX 9 at 5 (Dr. Colletti). Accordingly, I find that Claimant sustained an injury which is compensable under the Act.

The record reflects that Claimant received compensation from Employer for temporary partial disability from November 3, 2002 through December 20, 2002, and for temporary total disability from December 21, 2002 through May 23, 2003. EX 12 at 50-1, 54. The period of temporary partial disability is not in dispute, but Claimant asserts that he is entitled to additional temporary total disability compensation from May 24, 2003 through September 18, 2003, the date on which he reached maximum medical improvement. *See* TR at 9; ALJX 4 at 7.

Employer denies that Claimant is entitled to further temporary disability compensation, arguing that Claimant has not shown that he was unable to return to work as a longshoreman between May 24, 2003 and September 18, 2003. ALJX 5 at 4. Alternatively, Employer asserts that Claimant stopped physical therapy on July 29, 2003, has received no treatment for his injuries since then, and has offered no explanation for waiting until September 18, 2003 before returning to Dr. Santiano for clearance to work. Accordingly, Employer argues that Claimant has not shown that he was unable to return to work after July 29, 2003, and is therefore not entitled to temporary total disability benefits between July 29, 2003 and September 18, 2003. *Id.*

Under the Act, a claimant is presumed totally disabled once he establishes that he is unable to return to his usual employment. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). *See also Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980) ("A claimant who shows that he is unable to return to his usual employment establishes a prima facie case of total disability."). A claimant's credible complaints of pain alone may be enough to meet this burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Once there has been a prima facie showing of total disability, the burden shifts to the employer to establish the existence of suitable alternative employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980). Total disability becomes partial on the date that alternative employment is established. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1257 (9th Cir. 1990). If a claimant is medically able to work, but his condition is not yet permanent, the appropriate award is one for temporary partial disability in the event that employer establishes the availability of suitable alternate employment. *See* 33 U.S.C. §§ 908(e), (h). *See also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513 (4th Cir. 2000).

To establish suitable alternative employment, an employer must show specific, realistically available jobs within the geographical area where the claimant resides, which he is capable of performing considering his verbal and technical skills, age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988). An employer may fulfill its burden by showing that claimant is actually working within his work restrictions. *Ezell v. Direct*

Labor, Inc., 33 BRBS 19 (1999). A job in the employer's facility within the claimant's restrictions may meet this burden. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). However, the offer of a job which is too physically demanding for the employee to perform does not constitute suitable alternate employment. *See Bumble Bee Seafoods*, 629 F.2d at 1330.

The record shows that at various times Claimant was instructed by his doctors to remain off work. *See* CX 2 at 1; EX 3 at 10; EX 5 at 23-6. It is undisputed that Claimant was entitled to and received temporary total disability from December 21, 2002 through May 23, 2003. *See* EX 12 at 50-1, 54. On May 14, 2003, Dr. Santiano opined that Claimant was unable to return to work "until evaluated by doctor on May 30, 2003." EX 3 at 10. Claimant submits, and I agree, that Dr. Santiano's note on May 14, 2003 did not constitute an opinion that Claimant would in fact be able to work on or after May 30, 2003. *See* ALJX 4 at 7, n.2.

Thereafter, on May 30, 2003, Claimant saw Dr. Kamson, a specialist in minimal invasive spine medicine and surgery. CX 8 at 2. Dr. Kamson did not comment on Claimant's ability to return to work. However, several factors weigh against a finding that Claimant was medically able to return to work as of May 30, 2003. First, Claimant reported to Dr. Kamson on May 30 that he was still experiencing neck and left arm pain. On physical examination, Dr. Kamson recorded muscle loss, numbness, weakness, limited mobility of the neck and spasms in the cervical spine area and upper back. *Id*. at 3. Secondly, Dr. Kamson requested Claimant's diagnostic imaging studies and medical records in order to determine a further course of treatment for Claimant. The doctor also recommended that Claimant continue physical therapy. Thirdly, the record reflects that Claimant continued to receive physical therapy through July 29, 2003. *See, e.g.*, EX 13 at 81. I find that these factors show that Claimant was in need of and was engaged in ongoing treatment for his cervical injury on May 30, 2003 and beyond.

On September 18, 2003, Dr. Santiano cleared Claimant "to go back to work full-time." CX 2 at 9. To Claimant's knowledge, he had not been released to work by Dr. Santiano or any other doctor prior to September 18, 2003. TR at 36. I credit Claimant's testimony on this point, as the record contains no indication of any earlier medical release to work.

Based on the foregoing, I find that Claimant was unable to return to his former occupation as a longshoreman prior to September 18, 2003, the date on which Dr. Santiano first cleared him to return to work. Had Claimant's treating physician released him to work before he reached maximum medical improvement, earnings from jobs realistically and regularly available to him would be set off from his average weekly wage. *Berezin v. Cascade Gen.*, 34 BRBS 163, 166 (2000). However, Dr. Santiano never gave any earlier release and there is no indication that a release was given by any other physician. Accordingly, I find that Claimant has established a prima facie case that he was temporarily totally disabled until September 18, 2003.

A claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which Employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corps*., 25 BRBS 128 (1991). The suitable alternate positions must be within the Claimant's physical limitations, or they must be such that his limitations can be accommodated. *Jelenic v. San Pedro Boat Works*, 37 BRBS 707 (ALJ Sept. 12, 2003). Here, Employer has failed to offer any evidence of jobs—within or

outside of the longshore industry—that would satisfy these criteria and were available to Claimant before September 18, 2003. As a result, I find that Employer has failed in its burden of establishing suitable alternative employment.

I also find it noteworthy that Employer's decision to terminate temporary total disability benefits as of May 23, 2003 was not based on any medical opinion that Claimant was able to return to work or that suitable alternative employment had become available. Rather, Employer's insurance carrier notified Claimant of its decision to terminate temporary total disability benefits by letter dated May 5, 2003, wherein it expressed that it was "disappointed" that Claimant decided to cancel surgery with Dr. Newell. EX 12 at 52. The letter went on to advise Claimant that the insurer would authorize two more weeks of physical therapy, but would be "unable to authorize any time loss benefits past that 2 week period." *Id.* at 52-3. On June 5, 2003, Employer issued a notice of final payment or suspension of compensation benefits based on Claimant's "failure to follow through with prescribed medical treatment." *Id*. at 54, 55.

"When the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998). In this case, Claimant was presented with surgical and non-surgical options for the treatment of cervical condition. Dr. Newell examined Claimant on April 10, 2003, and advised that his treatment options were conservative therapy or surgery. EX 8 at 33. Dr. Santiano noted on May 7, 2003 that Claimant had been scheduled for neck surgery but had decided to "hold off," and Dr. Santiano supported Claimant's choice to forego surgery by referring him to Dr. Mallett for consideration of Botox injections. *See* CX 2 at 3; CX 7 at 1, 4. Ultimately, Claimant elected not to have surgery in favor of continuing physical therapy. TR at 35. Claimant testified that physical therapy helped his cervical symptoms. TR at 37-8. *See also* TR at 60. Indeed, Claimant's condition sufficiently improved with physical therapy to allow him to return to work. Based on this record, it cannot be said that Claimant's decision to pursue conservative treatment was invalid. That decision is left to him pursuant to *Amos*. *See Kerkhove v. Sea-Land Services Inc.*, 39 BRBS 33 (ALJ Feb. 10, 2005). Employer was thus not entitled to terminate temporary total disability benefits as of May 23, 2003 based on Claimant's decision to forego cervical spine surgery.

Based on the foregoing analysis, I find that Claimant established that he was unable to return to his regular employment at any time prior to September 18, 2003 due to his work-related cervical spine condition. I further find that Employer failed to establish that suitable alternative employment was available to Claimant any earlier than September 18, 2003. Accordingly, I find that Claimant is entitled to compensation for temporary partial disability from November 3, 2002 through December 20, 2002, and for temporary total disability from December 21, 2002 through September 18, 2003. *See* EX 12 at 50-1, 54.

2. The Extent of Claimant's Permanent Disability

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co*., 17 BRBS 56 (1985). "Disability" under the Act means incapacity as a result of an injury to earn wages which the

employee was receiving at the time of the injury at the same or other employment. 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a work-related physical impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). While the parties agree that Claimant suffered a work-related injury, the burden of proving the extent of his disability rests with Claimant. *Trask*, 17 BRBS 56, at 59.

It is undisputed that Claimant has worked longshore jobs for various employers since September 20, 2003, and that his permanent disability, if any, is a partial one. The question that remains is the extent of Claimant's post-injury wage-earning capacity. Wage earning capacity refers to "an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989). Section 8(c)(21) of the Act provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity in the same employment or otherwise.[5] 33 U.S.C. § 908(c)(21). If Claimant has a physical impairment but has suffered no loss in his wage-earning capacity, he has suffered no financial loss and therefore is not disabled. *Del Vecchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984).

Section 8(h) of the Act provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 908(h). In making this determination, consideration is given to such factors as a claimant's physical condition, age, education, industrial history, earning power on the open market, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1994). Regarding physical condition, consideration is given to whether the employee must seek light work, or turns down heavy work and requires more time off, *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850, 857 (1980), and whether the employee loses work for physicians' visits necessitated by the injury. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 330, 9 BRBS 453 (4th Cir. 1978).

The first step in the wage-earning capacity inquiry is to determine the amount of Claimant's actual post-injury earnings. The record reflects that since returning to work in September 2003, Claimant earned $19,536.85 in the last quarter of 2003 (12.7 weeks); $93,381.40 in 2004 (52 weeks); and $84,092.47 in 2005 (52 weeks). He also earned $38,082.11 through May 18, 2006 (20.7 weeks). EX 14, 16. Claimant thus earned a total of $235,092.83 over a period of 137.4 weeks of post-injury work, which results in an average weekly wage of $1,711.01.[6] These earnings, which include pay for both worked and travel hours, exceed Claimant's stipulated pre-injury average weekly wage of $1,684.30.[7] TR at 10-1.

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[5] Although Claimant initially claimed a scheduled injury, he stipulated at the hearing that this is an unscheduled injury case. TR at 11.

[6] ($19,536.85 + $93,381.40 + $84,092.47 + $38,082.11) / (12.7 weeks + 52 weeks + 52 weeks + 20.7 weeks) = ($235,092.83 / 137.4 weeks) = $1,711.01 per week.

[7] Although the parties did not specify the method used to determine Claimant's average weekly wage, I infer based on wage data in the record that the stipulated pre-injury average weekly wage includes travel pay. *See* EX 14. For example, in the thirteen weeks which made up the third quarter of 2002, Claimant earned gross wages of

As Claimant correctly points out, however, the mere fact that an employee is earning the same or more money following an injury is not determinative of whether the employee has sustained a loss in wage earning capacity. *Frye v. Potomac Electric Power Company,* 21 BRBS 194, 199 (1988). *See also Container Stevedoring Company v. Director, OWCP*, 935 F.2d. 1544, 1551, 24 BRBS 213, 222-23 (9th Cir. 1991) (higher present wages did not fairly represent wage-earning capacity where claimant had 20-22% disability, reduced hours, and worked at present job due to family obligations). A mere comparison of the average weekly wage and post-injury wages does not take into account whether these post-injury wages are representative of post-injury wage earning capacity, nor does it take into account inflationary factors. *See Miller v. Central Dispatch, Inc.*, 16 BRBS 64, 68 (1984), citing *Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649 (1979) and *Bury v. Joseph Smith & Sons,* 13 BRBS 694 (1981).

Claimant makes several arguments in seeking to establish a loss in wage-earning capacity. Claimant first argues that travel pay is not included with the Longshore Act's definition of "wages" for purposes of determining the amount of his actual post-injury earnings. Alternatively, if travel pay is included in the calculation of his actual earnings, Claimant argues that his travel pay earnings do not fairly represent his wage earning capacity, since including such earnings would artificially inflate his true wage earning capacity. *See* ALJX 4 at 9-10. Finally, Claimant submits that when travel hours are excluded, his actual work hours have decreased because his physical condition has limited the jobs he can take and the amount of time he can work. *Id*. at 11. As the party contending that his actual wages are not representative of his wage-earning capacity, Claimant has the burden of establishing an alternative reasonable wage-earning capacity. *Burch v. Superior Oil Co*., 15 BRBS 423, 427 (1983).

a. Are Travel Payments Included in the Definition of Wages?

Claimant submits that he has partially replaced his lost income with an increase in travel and subsistence pay which he receives when he takes a job in other ports due to the lack work in his local port of Coos Bay, Oregon. ALJX 4 at 5. *See also* TR at 46-7, 71; EX 18 at 156-58; EX 20 at 7. Claimant argues that travel pay is not included in the Longshore Act's definition of "wages" for purposes of determining whether he has any loss of wage earning capacity, and should therefore be excluded from the calculation of his actual post-injury earnings.

Section 2(13) of the Act defines wages as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of

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$23,119.40, or an average of $1,778.40 a week ($23,119.40 / 13 weeks). The gross wages include 495.25 travel hours paid at $13.84 hour, for total travel pay of $6,854.26. That amount subtracted from $23,119.40 yields $16,265.14 in gross wages paid for worked hours alone. This in turn yields an average weekly wage of $1,251.16 ($16,265.14 / 13 weeks), which is significantly lower than the stipulated average weekly wage of $1,684.30. EX 14 at 108. This pattern is repeated throughout the payroll records for the years 1999 through 2002. EX 14.

> the Internal Revenue Code of 1954[8] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit . . . .

33 U.S.C. § 902(13). The question is whether, for purposes of computing Claimant's actual post-injury earnings, his "wages" include the payments he receives for travel hours. There is little or no case law dealing with these particular types of payments.

The Benefits Review Board has specified that easily ascertainable advantages paid by the employer, which are included for purposes of tax withholding and are not fringe benefits, are considered wages under the Act. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988) (including overseas allowance, incentive compensation, completion award, foreign housing allowance, and cost of living adjustment in the calculation of wages). For example, wage guarantee payments are readily calculable, made directly to the employee by the employer, subject to tax withholding, and paid for services rendered in employment. They are therefore wages within the applicable statutory definition. *McMennamy v. Young & Co.*, 21 BRBS 351, 353 (1988). *See also Eyl v. Jones Washington Stevedoring Co.*, 32 BRBS 259 (ALJ April 23, 1998) (holding that pay guarantee plan payments are wages under section 2(13) for purposes of calculating the claimant's post-injury wage-earning capacity).

The Fourth Circuit Court of Appeals interprets section 2(13) to define "wages" as "the 'money rate' of compensation that is provided (1) for the employee's services (2) by an employer (3) under the employment contract in force at the time of the injury." *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 325 (4th Cir. 1998). This includes all cash compensation for services under the employment contract, whether or not subject to tax withholding, as well as any non-monetary "advantage" that is "readily identifiable and calculable" and subject to tax withholding. *Id.* at 319-320. *See also Custom Ship Interiors v. Director, OWCP*, 300 F.3d 510, 36 BRBS 51, 53-54 (4th Cir. 2002). In *Custom Ship*, the Fourth Circuit held that per diem payments to the claimant were part of his regular wages because the payments were received in his regular pay check as part of his employment contract; they correlated to the amount of time he worked each week; and they were unrestricted cash payments since the claimant was not required to spend the money on room and board. *Custom Ship*, 36 BRBS 51, at 54. The case involved monetary compensation, which was held to be includable in average weekly wage under the first clause of section 2(13) regardless of whether it is subject to employment tax withholding. *Id.*

In contrast, the Ninth Circuit, where the present claim arises, reached a different conclusion in interpreting the definition of "wages" contained in section 2(13). In *Wausau Insurance Companies v. Director, Office of Workers' Compensation Programs,* 114 F.3d 120 (9th Cir. 1997), the Ninth Circuit addressed the question of whether non-monetary compensation in the form of meals and lodging received by an employee were part of his wages. The court held that the Act defers to the IRS criteria for deciding whether non-monetary compensation counts as wages, stating: "If it is not money, or an 'advantage' subject to withholding, it is not

[8] 26 U.S.C.A. § 3101 *et seq*.

included." *Wausau*, 114 F.3d at 121. Similarly, in *McNutt v. Benefits Review Board*, the Ninth Circuit held that while a per diem a claimant received from an employer was an "advantage," it was not subject to withholding under the Internal Revenue Code and was therefore not included as wages under the Act. *McNutt*, 140 F.3d 1247, 32 BRBS 71 (9th Cir. 1998).

In this case, I find that the payments for travel hours are "wages" under section 2(13) of the Act. There are several reasons for this conclusion. First, this case involves cash paid to Claimant to compensate him for hours spent traveling. Travel hours are paid at half the basic hourly rate and the value of the payments are readily calculable based on Claimant's pay records. *See* ALJX 4 (Appendix A at 1, n.1); EX 14. Although "travel hours" are treated separately from "worked hours" on Claimant's payroll, the travel hours are paid as part of Claimant's gross wages along with worked hours. EX 14; CX 1. This case is thus distinguishable from *Wausau*, which dealt with non-monetary compensation in the form of meals and lodging, and is more like *Custom Ship*, where the Claimant received cash per diem payments as part of his regular pay check.

Secondly, I find that the travel payments are paid for services rendered by an employee based on eligibility requirements defined in the employment contract. *See* 33 U.S.C. § 902(13) (defining "wages" as "the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury . . ."). According to Mr. Weber, Area Manager for the Pacific Northwest Region of the PMA, a worker qualifies for travel pay under the labor agreement by traveling from his home port to the port where he is seeking work and getting a job through dispatch in the second port, although the worker must not neglect home port work. EX 19 at 7. The "service rendered," by which the employee earns the travel payment, is that he makes himself available for work in his home port, and if none is available, he follows the appropriate procedures for traveling to, obtaining, and performing work in another port. *See Eyl,* 32 BRBS 259 (guarantee payments were for services rendered since the worker "earns" payments by following procedures for establishing availability for work). Although Claimant asserts that travel payments are not compensation for services rendered because travel hours are paid without regard to the number of hours the longshoremen actually spend traveling, I find that this argument is disingenuous. ALJX 4 at 9. Travel payments are based on the round-trip travel time between area ports. *See* EX 18; TR at 47, 51-2. Claimant admits that he knows of no longshoreman beside himself who gets paid for travel hours even though he does not actually spend the time traveling. TR at 53.

Finally, the parties agree that travel pay is at least partially taxable. TR at 77; ALJX 4 at 9-10 and n.3. Travel pay may therefore properly be considered part of Claimant's wages even under the Ninth Circuit's more restrictive interpretation of section 2(13), which requires that any monetary compensation or non-monetary "advantage" be subject to tax withholding in order to be considered "wages." *Wausau*, 114 F.3d at 121. Although the record does not indicate what portion of the travel pay is taxable, I note that section 2(13) provides that "wages" include the reasonable value of any advantage included for purposes of "*any* withholding of tax" under the Internal Revenue Code. 33 U.S.C. § 902(13) (emphasis added). Presumably, this language would include cash payments which are at least partially taxable.

In sum, the travel payments are readily calculable, made directly to the employee, paid for services rendered in employment, and subject to tax withholding. *See McMennamy*, 21 BRBS at 353. Accordingly, I find that the travel payments are wages which may be included in Claimant's actual post-injury earnings. As previously noted, a worker's post-injury wage earning capacity "shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. § 908(h); *Sproull v. Director, OWCP*, 86 F.3d 895, 898 (9th Cir. 1996). Only if the actual earnings do not fairly and reasonably represent his wage-earning capacity should the ALJ adjust the actual earnings. *Id.* Claimant asserts that this is the case, and he bears the burden of so establishing.

b. Do Claimant's Actual Earnings Fairly and Reasonably Represent His Wage-Earning Capacity?

Claimant argues that his actual earnings do not fairly represent his post-injury wage-earning capacity. Specifically, he argues that even if travel pay is not excluded from the wage calculation "as a matter of definition," it still should be disregarded because it artificially inflates his earnings beyond his true earning capacity. ALJX 4 at 10. In support of this argument, Claimant points out that his earnings for travel pay arise from the unique circumstances of his being a longshoreman from a low work opportunity port (making him more frequently eligible for travel pay), and his working in a region where other ports have such increasing work opportunities that Claimant can obtain jobs in those ports even after priority is given to local union members. Claimant asserts that these "fortuitous" circumstances are not a fair measure of his earning capacity. *Id.* at 11.

In determining whether a claimant's actual post-injury earnings fairly and reasonably represent his wage-earning capacity, consideration is given to such factors as a claimant's physical condition, age, education, industrial history, earning power on the open market, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1994). Regarding physical condition, consideration is given to whether the employee must seek light work or turns down heavy work and requires more time off, *Conde v. Interocean Stevedoring,* 11 BRBS 850, 857 (1980), and whether he loses work for doctors' visits necessitated by the injury. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 330, 9 BRBS 453 (4th Cir. 1978).

With regard to his physical condition, Claimant asserts that he has a 30% impairment of the left upper extremity based on the opinion of Dr. Colletti. CX 9 at 5-6. I credit Dr. Colletti's opinion to the extent that it is based on his reported objective findings of Claimant's cervical radiculopathy condition, including trace left triceps reflex, and reduced strength and atrophy involving the left triceps muscle. *Id.* at 4-5. I note that Claimant's reduced strength and the presence of atrophy were also documented by other physicians of record. *See, e.g.,* CX 4 at 11 (Dr. Miller); EX 8 at 33 (Dr. Newell). Moreover, I have no reason to doubt Dr. Colletti's general credibility. However, for the reasons explained below, I do not find that Dr. Colletti's impairment rating constitutes persuasive evidence that Claimant's cervical impairment causes reduced work hours and a drop in wage-earning capacity.

I find that the persuasiveness of Dr. Colletti's opinion and report is diminished by the fact that he evaluated Claimant at the request of Claimant's attorney, presumably in anticipation of litigation. Claimant admitted that, aside from the evaluation by Dr. Colletti in 2005, he has not seen a doctor or received treatment for his cervical condition since 2003. TR at 58-9. Consistent with Claimant's testimony, the record does not contain any medical records or opinions from Dr. Santiano or any other treating physician which are more current than May or September 2003, nearly three years before trial. While Ninth Circuit precedent requires that I give "special weight" to a treating physician's opinion in considering medical evidence concerning the extent of a worker's injury, *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), I am not required or inclined to give any particular weight to the opinion of Claimant's independent medical examiner under the circumstances presented here. Moreover, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

Dr. Colletti's impairment rating notwithstanding, I also find that the record does not contain any medical opinion that Claimant has any work restrictions. On September 18, 2003, Dr. Santiano reported that Claimant was "cleared to go back to work full-time." CX 2 at 9. Arguably, this is not the same as a release to full duty without physical restrictions. However, Dr. Santiano reported that the express purpose of Claimant's visit was for "an evaluation to clear him" for work. *Id*. at 8. I find that Dr. Santiano performed said evaluation and released Claimant "to work full-time" without placing any restrictions on him. *Id.* at 9. The doctor advised Claimant to return if his symptoms worsened, but there is no indication that Claimant ever did so. *Id.*

Claimant argues that Dr. Santiano orally advised him to avoid jobs which cause neck pain and that this is what he has been doing. TR at 35-6, 58. However, Claimant has not introduced any report or opinion from Dr. Santiano to verify this "restriction" or clarify the extent, if any, of Claimant's physical limitations. I find that this is a conspicuous omission which undermines the credibility of Claimant's assertion that his physical condition limits the jobs he can take and the number of days he can work. Absent any medical opinion imposing physical restrictions, Claimant relies on his complaints of pain and his self-limitation of painful activities to support a finding of disability.

At trial, Claimant testified that since returning to work in September 2003, he continues to have neck pain, "a little bit" of pain in the left shoulder, and numbness and ache in the left arm. His symptoms worsen when he looks up or moves his neck side to side. TR at 39. Claimant testified that certain jobs bother his neck. TR at 40. Crane driving bothers his neck least since it does not require him to turn his head. TR at 39-40. He said that semi truck driving and forklift driving cause discomfort because those jobs require him to frequently look over both shoulders. TR at 40-1. Claimant has driven the forklift a few times since his injury and indicates that it bothered his neck every time. TR at 41. The log stacker job similarly requires the driver to look backwards. TR at 42. Claimant initially testified that bulldozer driving bothers his neck, but then could not recall whether he had tried that job since returning to work. TR at 40-2. Claimant also explained that the "checking" job requires the worker to look up at containers

being hoisted above his head to record a series of numbers on the container. TR at 42. Lashing jobs also require some looking up. TR at 43.

Claimant testified that of the jobs described above, he currently takes lashing jobs more frequently than any other job. TR at 43. He said lashing seems to be the least problematic job for his neck condition. TR at 43. Claimant also said that he has taken some of the other jobs on some occasions, and he "always will have to take at least one day off and maybe more in a row to get my muscles to relax again." TR at 44. Claimant testified that he tries to avoid working two days in a row "because of the pain." TR at 47. He further testified that so long as he takes "some time off," his symptoms do not seem to progressively worsen. TR at 60.

Claimant contends that he is a highly motivated worker, and uses this to buttress his argument that his pain alone limits the number of days he can work and the jobs he can accept. While I note that Claimant has rarely drawn guarantee pay (TR at 29-30), and has lost time from work due to injury on only one other occasion (TR at 30-1), I find that Claimant's credibility is undermined by his current exploitation of the union's travel pay system. Claimant's work pattern tends to maximize his pay with a minimal amount of actual work. By and large, Claimant has worked most frequently in the ports of Seattle and Tacoma since 2004.[9] *See* EX 14 at 114-138. Claimant also resides near this area, and therefore receives full travel pay—up to sixteen hours worth—for driving to these ports even though he does not actually make the trip from Coos Bay. I note that Claimant has a strong incentive not to work more frequently than every other day, since he forfeits fifteen hours of travel pay by working two days in a row in Seattle, to provide one example. Employer points out that there are also tax advantages to Claimant's work pattern, including his receipt of non-taxable subsistence pay and mileage for inter-port travel. ALJX 5 at 9.

Claimant readily admits that he resides near the Port of Everett in Washington and yet he receives sixteen hours of travel pay when he takes jobs at that port. However, he points out that he receives no travel pay when he drives sixteen hours to take a job in Coos Bay, "which he still does whenever there is a job he can take." ALJX 4 at 6; TR at 67. Claimant's eligibility for travel pay depends on his taking available jobs in his home port of Coos Bay. EX 20 at 7 (deposition of Joseph Weber). Nevertheless, it is apparent from the record that there is little work available in Coos Bay, thus Claimant is not required to make the trip there very often.[10] *See id.* at 34; EX 14. Under these circumstances, I find that Claimant's manipulation of the travel pay system undermines his claim that he would work more often but for his neck pain. Similarly, I am not persuaded by Claimant's argument that his receipt of travel pay under these circumstances should be disregarded as "fortuitous." *See* ALJX 4 at 11. There is no evidence that Claimant's ability to obtain jobs in ports outside Coos Bay and/or earn travel pay is in jeopardy. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993) (post-injury employment must be "regular and continuous" to establish earning capacity).

[9] Claimant has also worked with some frequency in Portland, Longview, Vancouver, and Everett. EX 14.

[10] The record reflects that Claimant has traveled to and from Coos Bay for jobs on fewer than 20 occasions from September 2003 through May 2006. EX 14 at 114-38.

In seeking to demonstrate a loss of wage earning capacity, Claimant compares the 52-week periods before and after his injury of November 2, 2002. In the 52 seeks prior to injury, Claimant worked a total of 1632.5 actual work hours in 198 shifts. ALJX 4 at 5; EX 14 at 101-02; TR at 48. This included eleven days during which the union was "locked out." TR at 48. In the 52 weeks after Claimant returned to work in September 2003, he worked 1405 hours in 171 shifts. In the next 52 weeks, he worked 1380 hours. EX 14 at 114-23. Claimant asserts that this corresponds to a 14% loss in wage earning capacity.[11] *See* TR at 50. Claimant asserts that the reduction in work hours is not due to a change in the total number of longshore jobs available, but to the number of days he feels like "his neck can handle working" and the availability of jobs he can perform in his physical condition. ALJX 4 at 5; TR at 49-50.

Employer disputes that Claimant has a loss in wage earning capacity. Specifically, Employer submits that Claimant's hours have actually increased, not decreased, following his injury on November 2, 2002. Employer represents Claimant's hours as follows:

Year	Worked Hours (inc. Travel Hours)	Non-Worked Hours[12]	Total Hours
1999	2978.25	298.81	3277.06
2000	3147.75	256.27	3404.02
2001	2796.50	268.84	3065.34
2002	2725.50	264.0	3266.0
2003	812.75	256.0	1068.75
2004	3491.50	264.5	3755.5
2005	3269.00	264.0	3533.0
2006 thru 5/18/06	1381.25	216.0	1597.25

ALJX 5 at 5-6. Employer contends that Claimant is working between 3269 and 3491.5 hours per year (including travel hours), which it contends is full time and represents an increase over hours worked before his injury. Employer points out that this is consistent with Claimant's medical release for "full-time" work. *Id*.

Employer further argues that even when Claimant's hours are broken down between actual worked hours and travel hours, Claimant still has not demonstrated any wage loss. Employer takes issue with Claimant's comparison of hours based upon various 52-week periods other than calendar years, most notably the 52-week period prior to his injury during which he claims that his worked hours (not including travel hours) were 1632.5. ALJX 5 at 7. Employer asserts that this time period is not comparable to other periods before or after Claimant's injury because during the 52-week period before the injury there were labor negotiations underway which lead to a slow down in production and a lock-out of the longshoremen for eleven days. *Id.*; TR at 48. Employer claims that the back up of ships at all area ports created an abnormal abundance of work which was not replicated before or since. *Id*. Employer therefore contends

[11] Claimant's alleged 14% loss of wage earning capacity is based on the difference in the number of shifts worked in the 52 weeks before the injury (198) and after the injury (171).

[12] Non-worked hours include pay guarantee plan payments, holiday pay and vacation wages. *See* EX 14.

that consideration of Claimant's wage earning capacity should be based on his work patterns during normal calendar years, rather than on one 52-week period. *Id.*

Employer provided the following table of worked hours by year:

Year	Actual Worked Hours	Travel Hours	Total Hours
1999	1354.0	1624.25	2978.25
2000	1421.5	1726.25	3147.75
2001	1356.00	1440.50	2796.50
2002	1361.00	1364.5	2725.5
2003	355.5	457.25	812.75
2004	1475.50	2016.0	3491.5
2005	1278.0	1991.0	3269.0
2006 thru 5/18/06	550.0	831.25	1381.25

ALJX 5 at 6. Employer contends that the table shows Claimant's highest year for actual worked hours was 2004, the first full calendar year after he returned to work in September 2003. *Id.* at 7. Employer further contends that the decrease in work hours in 2005 coincides with a decrease in work opportunities in the Portland/Vancouver area, where Claimant was working at the time. *Id.* (citing EX 17 at 151) (showing decline in total tonnage moved in Portland and Vancouver from 2004 to 2005).

I agree with Employer that Claimant's assertion that he worked 1632.5 hours during the 52 weeks before his injury distorts the picture of Claimant's work history. This number is significantly higher than the number of hours worked by Claimant during the various 52 week periods which make up the calendar years of 1999 through 2002. During those periods, Claimant worked an average of 1373 hours a year. Accordingly, I reject Claimant's use of the 1632.5 hours figure as it does not fairly reflect Claimant's work history.

When Claimant's actual worked hours before his injury (for 1999, 2000, 2001 and 2002) are compared with the actual worked hours for 2004 and 2005, there is no significant reduction in hours. For the years 1999 through 2002, inclusive, Claimant worked an average of 1373 hours a year, while he worked an average of 1376.75 hours in 2004 and 2005.[13] There is no indication that Claimant must spend more time or use more effort to achieve the level of his pre-injury production. *See Warren v. National Steel & Shipbuilding Company*, 21 BRBS 149, 153 (1988).

In light of the foregoing, it is my conclusion that Claimant has not established that his actual post-injury earnings do not fairly represent his wage-earning capacity. Claimant has been continuously employed since returning to work in September 2003. There is no evidence indicating that Claimant has had any difficulty obtaining jobs which he is physically capable of performing, and there is no medical opinion to support that Claimant has any physical

[13] Put another way, Claimant worked an average of 114.4 hours per month for 1999, 2000, 2001 and 2002, and an average of approximately 113.9 hours per month for 2004, 2005 and 2006 (through May 1, 2006).

restrictions which limit the jobs he can take or the hours he can work. Claimant's assertions that his pain and the need to frequently rest his neck force him to limit his work hours are not entirely credible given his manipulation of the union's travel pay system. Claimant's assertions are also belied by a comparison of the hours actually worked by Claimant before and after his injury, which reveals that there has been no significant reduction in his work hours. Moreover, the record reflects that Claimant is working between 3269 and 3491.5 hours per year including travel hours, which represents an increase over hours worked before his injury. This is consistent with Claimant's medical release for "full-time" work. Thus, having considered several relevant factors, including Claimant's physical condition, the availability of jobs he can perform, the stability of his current employment and his industrial history, I find that Claimant's actual post-injury wages fairly and reasonably represent his wage-earning capacity.

3. Comparison of Pre- and Post-Injury Wages

As previously noted, the record shows that Claimant's actual post-injury earnings consist of a total of $235,092.83 earned over a period of 137.4 weeks of work, which results in a post-injury average weekly wage of $1,711.01.[14] However, in order to compare post-injury wage-earning capacity and pre-injury average weekly wage on an equal basis, the wages earned in a post-injury job must be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The Benefits Review Board has held that if the record is devoid of evidence regarding the wages paid by the post-injury job at the time of injury, the administrative law judge should use the percentage increase in the National Average Weekly Wage to adjust current wages for inflationary effects. *Richardson*, 23 BRBS 237. However, when evidence does establish the actual wage a claimant's post-injury job paid at the time of injury, the adjustment for inflation in determining the effect of the injury on wage-earning capacity is made by comparing the average weekly wage with the post-injury job's actual wage at the time of injury. *Kleiner v. Todd Shipyards Corp*., 16 BRBS 297, 298 (1984).

Claimant points out that the increases in the base wage for longshore workers over the years since Claimant's injury are readily determinable from PMA payroll records. *See* ALJX 4 at 10. Those records show that the hourly base wage rate increased from $27.68 at the time of Claimant's injury in November 2002 to $28.18 in July 2003, $28.68 in July 2004, and $29.68 in July 2005. *Id.* at 10; CX 1 at 1, 2, 9, 18. Based on these figures, I find that Claimant's adjusted post-injury wage-earning capacity is $1,601.33.[15] That sum, subtracted from the stipulated pre-injury average weekly wage of $1,684.30, yields a wage loss of $82.97 per week. Claimant's compensation rate will be calculated accordingly. *See* 33 U.S.C. § 908(c)(21).

4. Employer's Obligation for Outstanding Medical Expenses

[14] *See* n.6, *supra*

[15] $27.68 is 93.26145% of $29.68. $1,717.03 x .9326145 = $1,601.33.

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). *See also Ingalls Shipbuilding, Inc., v. Director, OWCP*, 991 F.2d 163, 165 (5th Cir. 1993). In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978).

In this case, the parties stipulated that Claimant suffered an injury to his cervical spine on November 2, 2002 which arose out of and in the course of his employment with Employer. This is supported by medical opinions in the record. *See* CX 8 at 2 (Dr. Kamson) and CX 9 at 5 (Dr. Colletti). Accordingly, Employer must pay for any reasonable medical treatment already incurred by Claimant, including but not limited to any unpaid physical therapy treatments, as well as for future reasonable treatment of Claimant's work-related injury.

ORDER

It is hereby ORDERED that:

1. Employer shall pay Claimant compensation for temporary partial disability from November 3, 2002 through December 20, 2002, based on the difference between an average weekly wage of $1,684.30 and the actual wages Claimant earned during that period.
2. Employer shall pay Claimant compensation for temporary total disability from December 21, 2002 through September 18, 2003, based on an average weekly wage of $1,684.30.
3. Employer shall pay Claimant compensation for permanent partial disability from September 19, 2003 and continuing into the future, based on the difference between an average weekly wage of $1,684.30 and a post-injury wage-earning capacity of $1,601.33.
4. Employer shall provide all past and future medical care which is reasonable and necessary for the treatment of Claimant's work-related injury.
5. Employer shall pay interest on each unpaid installment of compensation at the rates prescribed under the provisions of 28 U.S.C. §1961.
6. Employer shall receive credit for all compensation and medical benefits previously paid to Claimant.
7. The District Director shall make all calculations necessary to carry out this Order.
8. Counsel for Claimant shall prepare and serve an initial Petition for Fees and Costs on the undersigned and on Employer's Counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Employer's Counsel shall initiate a verbal discussion with Claimant's Counsel in an effort to amicably resolve any dispute

concerning the amount requested. If Employer's Counsel and Claimant's Counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If they fail to amicably resolve all of their disputes, Claimant's Counsel shall, within 30 calendar days after the service of the initial fee petition, provide the undersigned and Employer's Counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussion with Employer's Counsel, and shall set forth in the Final Application the final amounts requested as fees and costs. Within 14 calendar days after service of the Final Application, Employer's Counsel shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, service of a document will be the date it was mailed.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California